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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

LARRY DEAN CORWIN,)	
)	No. 40618
Petitioner-Appellant,)	
)	Canyon Co. Case No.
vs.)	CV-2010-9778
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON

HONORABLE THOMAS J. RYAN
District Judge

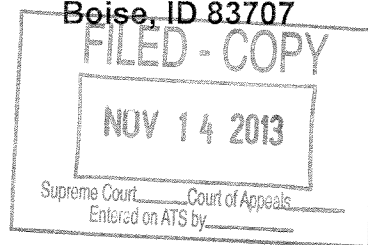
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STATEMENT OF THE CASE

Nature Of The Case

Larry Dean Corwin appeals from the district court's denial, following an evidentiary hearing, of his petition for post-conviction relief. On appeal, he argues that the district court erred by dismissing his claim that his conviction of felony driving under the influence with two prior DUIs in ten years violated his substantive due process rights, and that the court abused its discretion by neglecting to rule on a request to appoint substitute counsel at state's expense.

Statement Of The Facts And Course Of The Proceedings

In 1998, Corwin was convicted of driving under the influence in Idaho. (R., p.73.) In 1999, Corwin was convicted of driving under the influence in Washington. (R., p.79.) In 2007, Corwin was again arrested for driving under the influence in Idaho. (#34932 R., pp.4-6.¹) The state charged Corwin with, among other things, driving under the influence with a felony enhancement alleging two prior convictions for driving under the influence within the past 10 years. (#34932 R., pp.32-35.) Following a jury trial, Corwin was convicted of felony driving under the influence. (R., pp.163-64.)

Corwin appealed his judgment. (R., p.4.) His judgment was affirmed, and remittitur entered on September 28, 2009. (Id.)

On September 15, 2010, Corwin filed a timely petition for post-conviction relief alleging that his conviction for felony DUI deprived him of substantive due process and

¹ The district court took judicial notice of Corwin's underlying criminal case, CR2007-14070 (Tr., p.1, Ls.8-10), which corresponds to Supreme Court Docket No. 34932. Contemporaneous with the filing of this brief, the state filed a motion requesting the Court to take judicial notice of the record in Docket No. 34932.

that his counsel was ineffective. (R., pp.3-20.) The district court provided its notice of intent to dismiss Corwin's petition for post-conviction relief. (R., pp.84-93.) Corwin responded that he had raised a genuine issue of fact in regards to one of his ineffective assistance of counsel claims. (R., pp.99-104.) The district court held an evidentiary hearing on that ineffective assistance of counsel claim and summarily dismissed the other claims. (R., pp.157-59, 164; see also Tr.) Following the evidentiary hearing, the district court dismissed Corwin's petition. (R., pp.163-71, 182.)

Corwin filed a timely notice of appeal. (R., pp.173-75.)

ISSUES

Corwin states the issues on appeal as:

1. Is the use of expired criminal evidence by unreasonable application of a legislative act, reprehensible and objectionable to the interest of finality in constitutional conclusions of guilty pleas, the substantive due process doctrine, and the ex post facto clause?
2. Should the district court have resolved a conflict of interest issue, and substituted counsel before addressing the claims on their merits?

(Appellant's brief, p.3.)

The state rephrases the issues as:

1. Has Corwin failed to show error in the district court's dismissal of his claim that his conviction of felony DUI violated his substantive due process rights?
2. Has Corwin failed to show reversible error in the district court's failure to rule on his motion to appoint substitute counsel at state's expense before deciding the merits of Corwin's petition for post-conviction relief?

ARGUMENT

I.

Corwin Has Failed To Show Error In The District Court's Dismissal Of His Claim That His Conviction Violated His Due Process Rights

A. Introduction

Corwin was convicted of misdemeanor DUIs in 1997 and 1998, respectively. (R., pp.73, 79.) Under Idaho Code § 18-8005(5) at the time of his convictions, a third DUI offense committed within five years could be charged as a felony. In 2006, the Idaho legislature amended Idaho Code § 18-8005(5) by enlarging the timeframe from five years to ten years. In 2007, Corwin was convicted of a third DUI by jury verdict. (R., p.163.) The district court then entered a verdict convicting him of the felony DUI enhancement under Idaho Code § 18-8005(5). (R., pp.163-64.)

Following his conviction and subsequent appeal, Corwin filed a petition for post-conviction relief alleging, *inter alia*, that his conviction violated his substantive due process rights. (R., pp.4-5.) The district court summarily dismissed this claim. (R., pp.164-66.) On appeal, Corwin argues that the district court erred by dismissing this claim. (Appellant's brief, pp.4-15.) Application of the correct legal standards to the facts of this case, however, shows no error by the district court.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file" Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Corwin Is Not Entitled To Post-Conviction Relief

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). Generally, the Idaho Rules of Civil Procedure apply to petitions for post-conviction relief. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). However, unlike other civil complaints, in post-conviction cases the “application must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1).” Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008) (quoting Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)). Instead, the application must be supported by a statement that “specifically set[s] forth the grounds upon which the application is based.” Id. (citing I.C. § 19-4903). “The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party’s motion or on the court’s own initiative. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a

claim for post-conviction relief is subject to summary dismissal “if the applicant’s evidence raises no genuine issue of material fact” as to each element of the petitioner’s claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner’s un rebutted allegations as true, the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” Id.

Below, Corwin argued that his conviction for felony DUI deprived him of substantive due process because, he alleged, when he pleaded guilty to the earlier DUIs, he was guaranteed that after a five year period those convictions would no longer be admissible. (R., pp.4-5.) The district court interpreted Corwin’s argument as a contention that his conviction for felony DUI under the amended statute violated his plea agreement under the contract clause. (R., pp.164-65.) This was one of the issues directly addressed by the Court of Appeals in State v. Lamb, 147 Idaho 133, 206 P.3d 497 (Ct. App. 2009). In that case, the Court explained:

The notion that the trial courts’ warnings given in his prior DUI cases somehow became part of Lamb’s plea agreements is frivolous. A trial court’s advisement of the risk of future penalties under a recidivist statute is a *warning* designed to deter the defendant from committing future

offenses, not a *promise* that puts restraints on future prosecutions. It certainly does not constitute a promise that the law will, with respect to the defendant, never change.

Id. at 137, 206 P.3d at 501 (emphasis original, citation omitted).

Corwin's claim was indistinguishable from the claim raised by the defendant in Lamb. The legal merits of Corwin's claim were already weighed and rejected by the Court. The district court, relying on Lamb, properly dismissed Corwin's claim that his conviction violated his substantive due process rights under the contracts clause. (R., pp.164-66.)

On appeal, Corwin now claims that the district court misinterpreted his argument, asserting that he argued that the statute's amendment violated the *ex post facto* clause, not the contracts clause. (Appellant's brief, pp.4-15.) Under the circumstances of this case, that is a distinction without a difference. In fact, this is the other issue that was decided by the Court of Appeals in State v. Lamb.

As explained by the Court in Lamb:

Lamb is not being prosecuted for any offense which he committed before the 2006 amendment to I.C. § 18-8005(5). His exposure to prosecution for the present offense had not even arisen, let alone expired, when the statute was amended. Lamb's arguments notwithstanding, he is not being punished in the present case for the offenses he committed in 2001 and 2003. He has been prosecuted only for the DUI that he committed in 2007, about a year after the Idaho legislature amended the statute.

Id. at 136, 206 P.3d at 500. Likewise, Corwin was not prosecuted or punished in this case for his DUIs in 1997 and 1998. He was prosecuted for the DUI he committed in 2007, about a year after the Idaho legislature amended the statute. That prosecution (and subsequent conviction) does not violate the *ex post facto* clause.

Again, Corwin's claim is indistinguishable from the claim raised by the defendant in Lamb. The legal merits of that claim have already been weighed and rejected. The Court of Appeals, following the precedent of the United States Supreme Court, the Idaho Supreme Court, and virtually every other jurisdiction that has decided the issue, has already determined that the amendment at issue in this case did not violate the *ex post facto* clause. Id. at 135-36, 206 P.3d at 499-500. The statute is constitutional and its application to Corwin's case does not violate due process. The district court properly dismissed this claim and should be affirmed.

II.

Corwin Has Failed To Establish That The District Court Committed Reversible Error By Failing To Rule On His Motion To Appoint Substitute Counsel At State's Expense Before Ruling On The Merits Of Corwin's Post-Conviction Petition

A. Introduction

During the post-conviction proceedings, Corwin filed a "notice of conflict" with his attorney. (R., pp.112-14.) Later, Corwin withdrew that notice (R., p.133) and instead filed a motion to appoint substitute counsel at state's expense (R., pp.134-36). No action on that motion is reflected in the record.² The district court subsequently held an evidentiary hearing and, ultimately, denied Corwin's petition. (R., pp.157-59, 163-71, 182.) On appeal, Corwin argues that the district court abused its discretion by not ruling on his motion to appoint substitute counsel at state's expense before ruling on the merits of Corwin's petition. (Appellant's brief, pp.15-19.) Application of the correct legal standards shows no reversible error by the district court.

² The register of actions reflects that a status conference was held on June 29, 2012, between the filing of the motion to appoint substitute counsel and the evidentiary hearing. (R., p.2.) However, no minutes or other record of this conference is in the appellate record.

B. Standard Of Review

“The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” I.R.C.P. 61.

C. Corwin Has Failed To Show That The District Court Violated His Substantial Rights By Failing To Rule On His Motion To Appoint Substitute Counsel

Corwin alleges that the district court abused its discretion by not ruling on his motion to appoint substitute counsel at state's expense before addressing the merits of his petition for post-conviction relief. (Appellant's brief, pp.15-19.) In Hust v. State, 147 Idaho 682, 214 P.3d 668 (Ct. App. 2009), the Court of Appeals made clear

that any time a district court dismisses a petition for post-conviction relief on either substantive *or* procedural grounds without first addressing the petitioner's request for post-conviction counsel (assuming the petitioner made such a request), the court commits an abuse of discretion.

Id. at 685, 214 P.3d at 671 (emphasis original). There is no reason, however, to apply the same standard to motions to appoint *substitute* counsel at state's expense, especially where the petitioner fails to precipitate action on the motion but instead stands silent on that motion in subsequent proceedings. The bases of Corwin's motion were that counsel had failed to adequately familiarize himself with the underlying criminal case or the law, and failed to take certain steps Corwin felt appropriate. (R., pp.134-36.) Nine months later, however, Corwin was still accepting the representation of his court-appointed post-conviction counsel during his evidentiary hearing without voicing any objection. (See Tr.) Under the circumstances of this case, Corwin's actions (and inactions) should be viewed as a waiver of his request for the appointment of substitute counsel.

Even assuming that the trial court abused its discretion by failing to rule on Corwin's motion for substitute counsel at state's expense before deciding the merits of Corwin's petition for post-conviction relief, any error would be harmless. Post-conviction actions are civil proceedings, under which the Idaho Rules of Civil Procedure apply. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Harmless error is defined by the Idaho Rules of Civil Procedure, in pertinent part, as:

No error ... or defect in any ruling or order or in anything done or omitted by the court ... is ground for ... vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

I.R.C.P. 61.

There is no constitutional right to counsel in post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Even the Sixth Amendment, which gives defendants a right to competent counsel in criminal trials, does not equate to the counsel of one's choice, and "mere lack of confidence in otherwise competent counsel is not necessarily grounds for substitute counsel in the absence of extraordinary circumstances." State v. Gamble, 146 Idaho 331, 336, 193 P.3d 878, 883 (Ct. App. 2008) (citations omitted). Rather, to be successful, motions for appointment of substitute counsel require a showing of good cause. I.C. § 19-856 ("At any stage, including appeal or other post-conviction proceeding, the court concerned may for good cause assign a substitute attorney"). Corwin did not make a showing of good cause for the appointment of substitute counsel. Any defect in failing to rule on his motion before

deciding the merits of his petition for post-conviction relief therefore did not affect his substantial rights and must be disregarded.

Corwin appears to allege that his post-conviction counsel was ineffective. (Appellant's brief, pp.16-19.) A showing that counsel is ineffective may be good cause to appoint substitute counsel. To show ineffective assistance of counsel, the petitioner must show that his attorney's performance was objectively deficient and that he was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). Corwin has failed to show any deficiency in post-conviction counsel's performance, or any prejudice he suffered as a result of that performance. Initially, Corwin alleged that his attorney was inadequately prepared because he referred to a withdrawal of a nonexistent guilty plea, and ignorant of the law because counsel believed there was little merit to Corwin's substantive due process claim. (R., pp.134-36.) If post-conviction counsel was inadequately prepared in *February* for Corwin's case, he had cured that deficiency by the *November* evidentiary hearing he secured in Corwin's behalf. (See Tr., p.108, Ls.2-21.) Furthermore, as demonstrated above, post-conviction counsel was correct in regards to the legal merits of Corwin's substantive due process claim. (See Argument I, *supra*.) Corwin therefore failed to show that his post-conviction counsel rendered deficient performance.

Corwin also failed to show prejudice. Reviewing his motions below, Corwin's argument is essentially that he and his counsel had a difference of opinion regarding what trial strategy would be most successful in presenting his post-conviction claims. (See R., pp.112-14.) A difference in strategy does not constitute ineffective assistance

of counsel and is not sufficient cause to appoint substitute counsel at state's expense. Failure to rule on Corwin's motion to appoint substitute counsel, based on differences of strategy, did not prejudice Corwin's rights and is therefore harmless.

On the merits of Corwin's strategy, his argument fails. Corwin wanted to present claims of factual and legal innocence regarding his felony DUI conviction. (R., pp.118-24.) Under the circumstances of this case, neither approach would have justified relief as a matter of law. Regarding his factual guilt, Corwin essentially wanted to argue during his post-conviction proceedings that there was insufficient evidence presented at trial to sustain his conviction. (R., pp.118-20.) Post-conviction relief proceedings are not a substitute for proceedings in the trial court, or for an appeal from the sentence or conviction. Nellsch v. State, 122 Idaho 426, 430, 835 P.2d 661, 665 (Ct. App. 1992) (citing I.C. § 19-4901(b)). A claim that Corwin's conviction was based on insufficient evidence is the type of claim that should have been brought on direct appeal and, absent some new evidence, is not proper in post-conviction proceedings. Regardless, because post-conviction counsel secured an evidentiary hearing in Corwin's behalf, Corwin was still able to present all of his factual innocence claims and arguments. (See Tr., p.5, L.11 – p.58, L.1.) Corwin therefore cannot claim prejudice from his post-conviction counsel's decision to focus resources on Corwin's one colorable claim rather than this frivolous claim.

Corwin also wanted to challenge his conviction on legal grounds, under a theory that his conviction violated his due process rights. (R., pp.116, 121-22.) As shown above, this argument fails as a matter of law. (See Argument I, *supra*.) Post-conviction counsel's decision not to waste resources in pursuing this frivolous claim did not

prejudice Corwin and does not constitute grounds for the appointment of substitute counsel at state's expense.


Because Corwin failed to show that his post-conviction counsel was ineffective, he was not entitled to the appointment of substitute counsel at state's expense. The district court's failure to rule on Corwin's motion for substitute counsel, when he was not entitled to substitute counsel, did not prejudice Corwin's rights and is harmless. Even if the district court abused its discretion by omitting a ruling on Corwin's motion to appoint substitute counsel, that omission must therefore be disregarded.

Corwin has failed to show that a district court, in a civil proceeding, is required to rule on a motion for appointment of substitute counsel at state's expense where the movant fails to precipitate action on that motion. Even if a district court is required to rule on such a motion, the failure of the district court to rule on that motion in this case is harmless error because it did not prejudice Corwin's substantial rights.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order dismissing, after an evidentiary hearing, Corwin's petition for post-conviction relief.

DATED this 14th day of November, 2013.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of November, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by placing a copy in the United States mail, postage prepaid, addressed to:

LARRY DEAN CORWIN
IDOC #35015
ICC - G105B
PO Box 70010
Boise, ID 83707

A handwritten signature in black ink, appearing to read "Russell J. Spencer", written over a horizontal line.

RUSSELL J. SPENCER
Deputy Attorney General

RJS/mg